Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

S.L. 8 PAGE 28

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-6965

PAUL WILLIAM JORDAN,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

SUPPLEMENTAL ANSWERING BRIEF

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the State of Arizona

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76-6965

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PAUL WILLIAM JORDAN, Petitioner, -vs- STATE OF ARIZONA, Respondent.	NO. 76-6965 SUPPLEMENTAL ANSWERING BRIEF

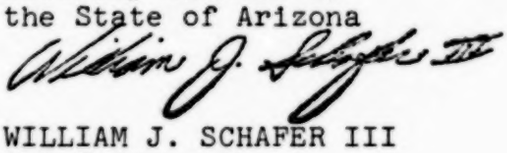
Petitioner, in his Supplemental Brief, notes that Mr. Justice Rehnquist denied a stay of execution in Richmond v. Arizona, No. 76-6720, because Mr. Richmond had failed to allege that an additional mitigating factors not specified in Ariz.Rev.Stat.Ann. § 13-454(F)(Supp.Pam. 1973) were applicable to Richmond's particular case. He notes that the Arizona Supreme Court has held that the trial court may consider only those factors listed in Ariz.Rev.Stat.Ann. § 13-454(F). State v. Richmond, 114 Ariz. 186, 195, 560 P.2d 41, 50 (Sup.Ct. 1976). He therefore contends that a petitioner cannot make a showing on the record of possible additional mitigating factors because the trial court will exclude such evidence as irrelevant.

Respondent submits that petitioner's contention is without merit. The Arizona rules of criminal procedure provide that the law of evidence relating to civil actions shall apply to criminal proceedings. Rule 19.3(a), Arizona Rules of Criminal Procedure. Under the rules of civil procedure, if the court sustains an objection to the offered testimony, the examining attorney may make an offer of proof. Rule 43(h), Arizona Rules of Civil Procedure (repealed Sep. 1, 1977). Under the new rules of evidence, the examining attorney must make an offer of proof in order to preserve the issue on appeal. Rule 103(a)(2), Arizona

Rules of Evidence (effective Sep. 1, 1977). This rule embodies the Arizona case law that requires an offer of proof unless it is obvious from the record what the offered evidence would be. State v. Belcher, 109 Ariz. 551, 553, 514 P.2d 472, 474 (1973); State v. Kaiser, 109 Ariz. 244, 247, 508 P.2d 74, 77 (1973); State v. Daymus, 90 Ariz. 294, 301, 367 P.2d 647, 651-52 (1961); M. Udall, Arizona Law of Evidence § 13 (1960); see State v. Dorow, No. 3875 (Ariz.Sup.Ct., Sep. 15, 1977); State v. Montijo, No. 2 CA-CR 1133 (Ariz.Ct.App. Sep. 20, 1977). There is therefore ample authority that would have allowed petitioner to place on the record whatever mitigating factors he felt that the trial court should have considered. Had he done so, this Court would have before it these factors to consider. He has instead left this Court in the same position as Mr. Justice Rehnquist was in when he denied Mr. Richmond's stay of execution. Having failed to place upon the record any mitigating circumstances that arguably should have been included by the Arizona Legislature in Ariz.Rev.Stat.Ann. § 13-454(F), petitioner has failed to raise an issue upon which this Court should grant certiorari.

Respectfully submitted,

BRUCE E. BABBITT
Attorney General of
the State of Arizona



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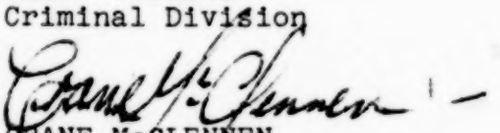

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AFFIDAVIT OF MAILING

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, CRANE McCLENNEN, Assistant Attorney General, Arizona Attorney General's Office, being first duly sworn declare that pursuant to Rule 33, I have served a copy of the attached SUPPLEMENTAL ANSWERING BRIEF on petitioner's attorneys by depositing the same, addressed as follows, in the United States mail, postage prepaid:

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DATED this 26th day of September, 1977.

Crane McClennen
CRANE McCLENNEN

SUBSCRIBED AND SWORN to before me this 26th day of September, 1977.

Elizabeth J. Bender
NOTARY PUBLIC

My Commission Expires:

July 17, 1978